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AUTHOR Flannery, J. Harold
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ABSTRACT

This article focuses upon Federal law in relation to school desegregation. The groundwork for many of the relatively recent legal developments in Northern school desegregation law had been laid more than a decade ago. Because the Southern cases were absorbing black organizational resources and preoccupying the federal authorities, and because questions as to which Northern practices were unconstitutional had not been judicially answered, the possibilities inherent in the early groundwork were not quickly exploited. Although many educators and lawyers find the reasons for maximizing desegregation to be compelling, as have a majority of the courts in Northern cases, it would be premature to characterize that, until the Supreme Court has spoken, as the standard always and everywhere. The courts have held to be illegal a wide variety of Northern assignment devices that have resulted in pupil and teacher segregation. And no less than in the South, the courts are requiring school districts and, where appropriate, state authorities, to adopt and implement desegregation plans that promise realistically to work now. (Author/JM)

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Feature Article

SCHOOL DESEGRATION LAW: DEVELOPMENT, STATUS AND PROSPECTS

J. Harold Flannery[1]

The future of public school law in the area of racial desegregation is necessarily in part conjectural. There are a number of questions to which the courts, particularly the United States Supreme Court, have not addressed themselves, so confident predictions are as fallible as they are easy. On the other hand, speculation can be informed because the development of the law is a process of building the future upon the past. An objective of this paper is to summarize the developments that have brought us to where we are, in order to permit projections that are more than guesswork.[2]

In the *Brown* cases in 1954 and 1955 the Supreme Court ruled that state-imposed racial desegregation in the field of public education was unconstitutional. For about the next decade and a half, as Northern segregation worsened, most public energy and attention went into largely unsuccessful efforts to end the racial dualism characteristic of school systems in the South. The net effect of these non-developments was that by the late sixties more white and black children were attending racially segregated schools than at the time of the *Brown* decisions.

Most of the reasons for these defaults may by now be of more academic than operational interest. But some consideration of them is appropriate because certain ones operate today in slightly altered forms.

The present article focuses upon federal law. However, it may be relevant to some readers that a number of states, most notably California, Connecticut, Illinois, Massachusetts, Minnesota, New Jersey, New York, Pennsylvania, and Rhode Island, have adopted laws or regulations providing for school desegregation. Complete consideration of these questions in those states should include reference to such provisions.

Lastly, I do not dwell herein upon either of two headline-catching issues often associated with school desegregation: neighborhood schools and busing. Chief Justice Burger summed up their present legal significance in the case involving Charlotte, North Carolina, where he wrote: "Desegregation plans cannot be limited to the walk-in school." Moreover, the political and policy crosscurrents involved in those questions cannot be dealt with in these few pages, except at the price of failing to treat adequately other more basic principles.

Constitutional requirements are often not self-executing, and particularly formidable obstacles soon developed to implementing school desegregation. Soon after the second *Brown* decision, several lower federal courts held that those cases did not impose upon dual systems an affirmative obligation to unify racially. Consequently, while individual children crossed racial lines (invariably from black schools to white schools rather than two-way) through pupil placement tests and new transfer options, the systems themselves

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[1]Deputy Director, Center for Law and Education, Harvard University. The views expressed herein are not necessarily those of the Center or the University.

[2]Omitted herein are many of the usual trappings of legal scholarship, such as case citations and detailed qualifying footnotes. To any who may wish to pursue those aspects I commend a somewhat more technical article by my associate, Paul R. Dimond, *School Segregation In The North: There Is But One Constitution*, 7 Harvard Civil Rights-Civil Liberties Law Review_____(1972).

remained dual — pupils, teachers, bus routes and athletic conferences. Moreover, school desegregation did not become national legislative policy until the Civil Rights Act of 1964; therefore, enforcement was left to the courts, and even they could act only in particular cases brought, for the most part, by poor and often intimidated black families.

In the North, meanwhile, it was commonly assumed that school segregation, however undesirable, was not illegal because it was the product of fortuitous social forces rather than racially explicit state laws. This assumption was reinforced in the mid-sixties when the courts refused, in three widely publicized Northern cases, to uphold plaintiffs' claims that they were entitled to a desegregated education regardless how the systems had become segregated. Congress gave additional support to this view by providing in the 1964 Act that overcoming racial imbalance — a common synonym for fortuitous segregation — was not required.

Even in the South desegregation did not follow on the heels of the 1964 law, largely because the courts and federal executive officials (the Department of Justice and H.E.W.) continued to approve ineffective plans, such as freedom of choice and color blind attendance zoning, that seemed racially neutral. During this period, thoughtful citizens of both races knew that racially neutral policies perpetuate most of the effects of generations of segregation and discrimination, and that more affirmative steps would be required to eliminate those effects. But it was not until a series of decisions, beginning with a Virginia case in 1968 and culminating — for the time being — with the *Charlotte* and *Mobile* cases last year, that the Supreme Court established "the greatest possible degree of actual desegregation" as the standard for compliance with the law in the South.

Problems of implementation remain in the South, but measurable progress has been made. Thus, H.E.W. reported on January 12 of this year that there are now fewer black pupils, in numbers and percentages, in all-black schools in the South than in the Northern and border states.[3]

The attention given to the Southern scene during the 1950's and 60's obscured three developments that were to become particularly significant for Northern school segregation. First, the Supreme Court in its second *Brown* decision explicitly condemned racial discrimination, as well as segregation, in public education. At least in retrospect, the addition of that prohibition was not legally novel, but its implications for systems that were practicing racism short of Southern absolute dualism were not fully perceived. Secondly, in a little noticed Northern-state case one year after *Brown II*, the U.S. Court of Appeals for the 6th Circuit confirmed that segregatory policies and practices by school boards violate the Constitution no less than explicit state laws. And thirdly, any doubts as to the unconstitutionality of racial discrimination in public education in all states were laid to rest by the federal court's opinion (later affirmed by the Supreme Court) in a 1961 New York case.

In sum, it can be seen from this vantage point that the groundwork for many of the relatively recent legal developments in Northern school desegregation law had been laid more than a decade ago. However, it is equally clear that, because the Southern cases were absorbing black organizational resources (such as the N.A.A.C.P.) and preoccupying the federal authorities, and because questions as to which Northern practices were unconstitutional had not been judicially answered, the possibilities inherent in the early groundwork were not quickly exploited. They have been more recently, however, and to those developments we now turn.

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[3]New York Times, p. 32, January 13, 1972.

Several cautions are appropriate at the outset. First, although each of the doctrines discussed below is supported by one or more of the Northern decisions, no one of them is present in the same form in every case — in contrast to the deep South cases where state segregation statutes, for example, have been a common thread. Secondly, although the Supreme Court has conspicuously declined several opportunities to overturn or modify lower court findings of illegal Northern segregation, it has not spoken to the issues so extensively as in a number of Southern cases. Consequently, while the following discussion and conclusions are well supported by the law as it stands, some are necessarily tentative and subject to modification as the judicial process continues. Finally, two extremely important facets of school desegregation law, North and South, are treated only very briefly below because each is legally severable from the narrower questions and would merit separate consideration for adequacy within reasonable length.

They are, first, the range of integration questions that arise after desegregation, such as pupil classification practices (tracking grouping and others) that may result in intra-school segregation, discriminatory discipline patterns, extra-curricular activity selection practices that are discriminatory, and biased program materials. Secondly, several recent decisions indicate that state-level education authorities may be required to realign school districts, or provide for pupil assignments across district lines, where equality of opportunity via desegregation can not be accomplished within districts that are themselves racially identifiable and segregated from adjacent ones. Extreme examples of this are seen in Washington, D.C., and several of its neighbors which are black-segregated and white-segregated from each other. Meaningful desegregation can not be achieved within a system that is virtually uniracial.

The questions to be considered are now, what policies and practices have the courts held to be illegal as violations of the 14th Amendment and what remedial steps are required after violations have been found?

1. *Faculty and Staff* — the courts have held that racial discrimination is unconstitutional in the recruitment, hiring, assignment and reassignment, promotion, demotion and dismissal of faculty and staff, including administrators. Thus, systems that have assigned minority personnel in disproportionate numbers to schools that are disproportionately attended by minority pupils are in violation of the law; and the remedy is proportional reassignments so that the faculty and staff of each school in the system reflect approximately the racial composition of the system's entire personnel corps. Moreover, several courts have held that the presumption of innocence concerning pupil assignment policies should not be accorded to school boards that have practiced discrimination in teacher assignment practices.

2. *Pupils* — (a) Gerrymandering of school attendance zone lines to effect racial segregation of pupils is illegal. For example, adjacent black and white schools may be "innocent" reflections of the neighborhoods they serve. But if one of them is being operated over its capacity while the other has extra space available, the school authorities bear a heavy burden of persuading the court that they drew the zone line where they did — or are failing to adjust it — for non-racial, educational reasons.

(b) Parent-pupil school selection arrangements, such as open enrollment, free transfers, and optional attendance zones, are illegal practices to the extent that they result in more segregation than would some other educationally sound and readily available pupil assignment mechanism.

(c) Racially separatist pupil transportation practices are illegal. Dual overlapping zones

are rarely found in the North, but other impermissible practices, such as transporting children to relieve overcrowding past an underutilized school attended predominantly by children of the opposite race to another school attended by children of the same race, do occur. Similarly, some transportation to relieve overcrowding takes the form of moving a class of children and their teacher to an opposite race school but keeping them intact there as a racially identifiable subgroup within the receiving school. That, too, is not permissible.

(d) The construction of new schools upon sites that are more segregated than others available is illegal. Similarly, the expansion of existing schools and the use of portables or auxiliary facilities are illegal where the system has less separatist alternatives. A striking example of this practice was seen in an Oklahoma case where the system flouted its own guidelines concerning the proper size of elementary schools in order to build two half-size schools to serve adjacent, racially different neighborhoods.

(e) Schools may be organized in a variety of racially neutral ways (6-3-3 or 8-4 for example) but manipulation of grade structures so as to create or maintain greater racial separation of pupils than would be obtained with a different form is illegal. Thus, H.E.W. has recently alleged that Boston, Massachusetts, has illegally structured certain secondary grades so as to create racially identifiable subsystems.

(f) As noted above in connection with school site selection and construction, it is illegal to deliberately build upon residential racial segregation. Although the Supreme Court has not yet spoken to the question, numerous lower federal courts have decided that, where residential segregation is the product of public or private racial discrimination, school authorities have an affirmative obligation to avoid incorporating the effects of such discrimination into their systems. In effect, they must adopt pupil assignment arrangements that overcome the effects that such other discrimination would have upon racially "neutral" assignment criteria.

(g) Segregated classroom assignments and other intra-school racial discrimination are illegal. In a number of Southern cases the courts have held that systems which are converting from dual to unitary may not adopt pupil tracking devices that produce intra-school segregation. However, that is just the tip of an iceberg, and as noted previously, detailed consideration of intra-school discrimination is beyond the scope of this article.

(h) In several important Northern cases the courts have decided that it is illegal for school systems to rescind voluntary desegregation plans in response to community hostility, and it is illegal for states to interfere with voluntary plans by legislation. The court's reasoning is that the system may not have been obliged to adopt the plan on the basis of a finding of prior illegality, but that the non-educationally motivated recission is a de jure act but for which children would be attending schools on a desegregated basis.

(i) A number of cases, principally but not exclusively in the South, have held that just as attendance zone lines may not be gerrymandered to produce racially identifiable schools, so too, the lines of school districts themselves may not be manipulated to that effect. And conversely, state school authorities may not fail, for racial reasons, to create, dissolve, and adjust districts as they normally would (for reasons of economics, numbers of pupils, and desirability of size) in racially homogeneous areas.

(j) Although it is not always directly related to the remedy of pupil desegregation, it is illegal for districts to spend fewer local instructional dollars at minority schools than they do at majority schools.

(k) Finally, the court in one important Northern case held that the whole of a series of policy decisions was, in effect, greater than the sum of its parts. That is, in a district which had for years professed to value desegregation, a sustained failure to exercise any option to that effect was viewed by the court as a policy of segregation, even though the measurably separatist effect of any one of the board's policy choices was not great.

The foregoing racially discriminatory practices, usually in various combinations, add up to illegal Northern school segregation. Of course, they are no less illegal in the South, but the courts have had less occasion to examine them there because the widespread state segregation laws were conclusive at the outset on the question of illegality.

We turn now to the questions of remedy: what must school authorities do to cure illegal segregation and its effects? The first and currently most important question is, how much desegregation does the law require. According to the Supreme Court in the *Charlotte* and *Mobile* cases, in the South, where unconstitutional laws required complete separation, the standard of adequacy is maximum actual desegregation. The Court did not require "racial balancing" in so many words, but there appears to be general agreement among lawyers and educators that full compliance with the court's standard will result in each school in affected systems being an approximation of the racial ratio in the district as a whole. And school authorities will bear a heavy burden of justifying (upon nonracial grounds of impracticability) statistically significant departures from that standard.

Is that the standard of adequacy in the North, however, where the illegal practices have rarely, if ever, completely segregated children into parallel dual systems? There are two schools of thought on this question — albeit with the usual assortment of eclectics, and the Supreme Court has not yet decided this issue, although it may do so during this term.

One line of reasoning is exemplified by President Nixon's school desegregation statement in March of 1970. It is that school authorities are obliged only to cease illegal practices and cure their measurable effects. By this standard all school segregation resulting from factors other than school board policies and practices would be characterized as fortuitous and left untouched. The basis for this position is usually said to be that the traditional remedial powers of federal equity courts are limited to prohibiting, and curing the effects of, provable illegal conduct. And that, while complete desegregation may be educationally desirable, courts are not empowered to formulate and implement social policy.

The position in support of a remedial standard of maximum feasible desegregation may be summarized as follows. First, as a practical matter it is virtually impossible to quantify precisely the separatist effects of illegal school board practices, and there is no reason in law or policy to place the burden of doing so upon proponents of desegregation. Thus, where a school board has affected the residential composition of a mixed neighborhood by creating a racially identifiable school (by, for example, selecting a segregated site and assigning a disproportionately minority faculty), the plaintiff should not be required to prove to a certainty that, but for the board's conduct, the school would today be desegregated. Second, courts should not favor remedial plans that may cause resegregation and intra-district instability. These are common effects of plans that desegregate some schools while leaving others disproportionately white (or black) toward which parents who wish to avoid desegregation may "flee." Third, balancing is more likely to insure an equitable distribution of intra-district educational resources, and it promotes socio-eco-

nomic heterogeneity, which along with racial desegregation has been identified as an important factor in equality of opportunity. Fourth, if desegregation is educationally advantageous, it would seem prudent to maximize it, although something less might also satisfy the law. And lastly, minimal desegregation plans tend to prolong a district's litigation burden by inviting appeals and motions for supplemental relief.

In sum, although many educators and lawyers find the reasons for maximizing desegregation to be compelling, as have a majority of the courts in Northern cases, it would be premature to characterize that, until the Supreme Court has spoken, as the standard always and everywhere.

The second aspect of the question of remedy is, what devices or techniques must or may school districts use to accomplish desegregation. The courts require that districts must use any educationally sound and administratively feasible device that is necessary to accomplish the objective. That is, racially "neutral" pupil assignment plans in place of formerly discriminatory ones are not sufficient, unless they achieve desegregation. Similarly, the test is not whether plans are adopted in "good faith;" they are sufficient only if they do the job.

No one plan or set of mechanisms is appropriate for every district, so it would not be fruitful to discuss each device in detail here. Briefly, the ones required by courts have included:

(a) Integration-oriented redrawing of attendance zone lines and, in several cases, school district boundaries;

(b) Contiguous and non-contiguous school pairings and groupings, with or without grade restructuring;

(c) Revised site selections and construction policies, including educational parks and new uses of portables;

(d) Optional devices, including majority to minority transfers, magnet schools, differentiated programs, and metropolitan cooperation;

(e) Pupil transportation;

(f) Faculty and staff desegregation, including recruitment and hiring as well as promotions, dismissals, and reassignments; and

(g) Non-discriminatory reallocation of intra-district resources.

It should be emphasized with respect to (d) (optional devices) that they are legally adequate as desegregation mechanisms only to the extent that they are actually effective.

It must also be emphasized that the courts will not permit the adoption — voluntarily or otherwise — of desegregation plans that are themselves racially discriminatory. For example, plans that are based upon one-way busing of minority children, or the closing of educationally adequate minority-schools, have been forbidden. Essentially, two principles underlie this doctrine. First, plans which unnecessarily inconvenience minority children and parents, in order that majority convenience may be served, are as discriminatory as segregation itself, and hence illegal. Secondly, such plans are unsound from the standpoint of policy in that they risk forfeiting the support of the minority community.

The last remedial question is, whose legal responsibility is it to accomplish the required results. School desegregation cases have focused traditionally upon local school districts, and they will not be relieved of that obligation in the cases to come. However, building to some extent upon several Southern cases, the courts are, in effect, rediscover-

ing that providing equality of educational opportunity to all children is ultimately the non-delegable constitutional responsibility of the states. To be sure, most states have conferred appropriate authority upon local districts for reasons of convenience. But the legal responsibility for fulfilling constitutional guarantees is that of the states, whether they do it themselves or through their instrumentalities. Thus, in the recent words of Judge Mehrige in the Richmond, Virginia, case:

> Federal courts in school desegregation matters may legitimately address their remedial orders to defendants with statewide powers over school operations in order to eliminate the existence of segregation in schools chiefly administered locally by subordinate agencies.

To summarize, the courts have held to be illegal a wide variety of Northern assignment devices that have resulted in pupil and teacher segregation. And no less than in the South, the courts are requiring school districts and, where appropriate, state authorities, to adopt and implement desegregation plans that — in the words of the Supreme Court, "promise(s) realistically to work, and promise(s) realistically to work *now*."

The development, status, and prospects of some political rhetoric may be otherwise, but judges and educators, let us all hope, are guided by the law.